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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 SUKUMARAN MUTHU,
12 Plaintiff,
13 v.
14 U.S. DHS/ICE-EL CENTRO, et al.,
15 Defendants.
16 _____

Case No. 14-CV-967-BAS (JMA)

REPORT AND
RECOMMENDATION RE
DEFENDANT AUHL'S MOTION
TO DISMISS FOR LACK OF
SUBJECT MATTER
JURISDICTION
[ECF No. 11]

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18 Sukumaran Muthu ("Plaintiff"), formerly an immigration detainee at
19 the U.S. Department of Homeland Security's ("DHS") Immigration and
20 Custom Enforcement's ("ICE") Processing Center in El Centro, California,
21 is proceeding in pro se and *in forma pauperis* in this civil rights action
22 previously construed by the Court as arising under Bivens v. Six Unknown
23 Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971).
24

25 **I. Procedural History**

26 Plaintiff initiated this action on April 17, 2014. (ECF No. 1.) On
27 August 29, 2014, the Court, liberally construing Plaintiff's case to arise
28 under Bivens, dismissed all claims alleged in the Complaint with the

exception of an inadequate medical care claim alleged against Defendants Auhl, Chan, and Carreno. (ECF No. 6.) The Court directed the United States Marshal's Service to effect service of the Complaint on these defendants. (*Id.*) On November 12, 2014, Defendant Auhl filed a Motion to Dismiss for lack of subject-matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1). (ECF No. 11.) Plaintiff filed an opposition on December 15, 2014. (ECF No. 18.) Defendant Auhl filed a reply on January 9, 2015. (ECF No. 23.)¹

The Court has determined that the motion is suitable for disposition upon the papers without oral argument. See S.D. CAL. CIVLR 7.1(d)(1).

II. Factual Allegations²

Plaintiff was housed as a detainee at the DHS/ICE-EI Centro Detention Center on August 20, 2011. See Compl. at 6. Plaintiff has experienced severe pain in his right shoulder since that date, and alleges that Defendant Auhl, head of the facility's clinical department, and Defendants Carreno and Chan, facility medical providers, were deliberately indifferent to his medical needs. (*Id.* at 3, 6.) Plaintiff sues each of the defendants in their individual and official capacities. (*Id.* at 3.)

Plaintiff lodged a complaint with the facility's medical department, but was only prescribed ibuprofen for the pain. (*Id.* at 6.) Plaintiff endured months of pain until he was seen by a specialist outside of the facility in February 2012. (*Id.*) The doctor performed an injection and assured Plaintiff he would be pain-free for six months. (*Id.*) However, the pain returned ten days later. (*Id.*) Defendants referred Plaintiff back to the

¹Defendant Carreno filed an Answer to Plaintiff's Complaint on October 24, 2014. (ECF No. 8.) Defendant Chan has not appeared in the case.

²The allegations are those set forth in Plaintiff's Complaint.

1 specialist, who recommended an MRI scan, which occurred two months
2 later. (Id.) The specialist recommended surgery after the MRI revealed
3 damage to Plaintiff's right shoulder ligament. (Id.)

4 Plaintiff continued to endure pain until the surgery was performed on
5 September 25, 2012. (Id.) A week after the surgery, the surgeon removed
6 the surgical staples and referred Plaintiff to physical therapy. (Id.) The
7 surgeon warned Plaintiff that the therapy had to start immediately, and that
8 Plaintiff could face additional problems if his shoulder ligaments did not
9 heal properly. (Id.) Plaintiff was not provided with physical therapy,
10 however, and claims he lost most of the function in his right arm. (Id.)
11 After making several complaints to the facility's medical department as well
12 as directly to Defendant Auhl, Plaintiff was transported to see the surgeon
13 in November 2012. (Id.) Afterwards, Plaintiff continued to complain to the
14 facility about pain but was only prescribed pain medication. (Id. at 7.) He
15 was scheduled to see the surgeon again in February 2013, but the doctor
16 rejected the appointment until after physical therapy had begun. (Id.)
17 During an exam conducted on March 19, 2013, the doctor stated that
18 Plaintiff's outcome was not his fault, but was due to the failure of the
19 facility. (Id.) He advised Plaintiff that another surgery of the right shoulder
20 was necessary. (Id.)

21 Plaintiff began physical therapy on April 4, 2013. (Id.) After going
22 twice per week for four weeks, the physical therapist recommended that
23 Plaintiff return to the doctor because his arm was not responding to the
24 therapy. (Id.) Plaintiff alleges that because it took so long to send him to
25 physical therapy, his shoulder healed incorrectly. (Id.) Plaintiff states that
26 Defendant Auhl denied the referral for a second surgery, allegedly telling
27 Plaintiff, "In this country, shoulder surgeries are only one percent
28 successful and another ninety-nine percent are not going to be good." (Id.)

1 At Auhl's referral, Plaintiff saw the surgeon again on January 15, 2014. (Id.
2 at 8.) The surgeon tried one remaining option, an injection performed
3 under anesthesia. (Id.) The pain worsened after this treatment. (Id.)
4 Plaintiff attended physical therapy, but the therapist stated that the
5 procedure had not worked, and that only another surgery would work, and
6 refused to start therapy. (Id.)

7 Plaintiff alleges that Defendants refuse to allow the second required
8 surgery. (Id.) Plaintiff continues to suffer from extreme pain on a daily
9 basis due to Defendants' willful and callous indifference. (Id. at 5.)
10

11 **III. Discussion**

12 Defendant Auhl moves to dismiss the sole claim alleged against him
13 for lack of subject-matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1)
14 on the grounds that as a Public Health Service Officer, he is immune from
15 such a claim.

16 **A. Legal Standard**

17 A party may move to dismiss a claim for lack of subject-matter
18 jurisdiction. Fed. R. Civ. P. 12(b)(1). A pleading that states a claim for
19 relief must contain "a short and plain statement of the grounds for the
20 court's jurisdiction." Fed. R. Civ. P. 8(a)(1). "Federal courts are courts of
21 limited jurisdiction . . . [and] possess only that power authorized by
22 Constitution and statute" Kokkonen v. Guardian Life Ins. Co. of
23 America, 511 U.S. 375, 377 (1994). The burden of establishing jurisdiction
24 is on the party asserting jurisdiction. Id. The Court must dismiss an action
25 if it determines at any time that it lacks subject-matter jurisdiction. Fed. R.
26 Civ. P. 12(h)(3).

27 A Rule 12(b)(1) motion asserting lack of subject-matter jurisdiction
28 may be either a facial attack on the sufficiency of the pleadings or a factual

1 attack on the basis for a court's jurisdiction. White v. Lee, 227 F.3d 1214,
 2 1242 (9th Cir. 2000). "In resolving a factual attack on jurisdiction, the
 3 district court may review evidence beyond the complaint without converting
 4 the motion to dismiss into a motion for summary judgment." Safe Air for
 5 Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004). Moreover, the
 6 Court need not presume the truth of the plaintiff's allegations when
 7 resolving a factual attack. Id. Once the moving party has presented
 8 affidavits or other evidence in support of its factual attack on the basis for
 9 the Court's jurisdiction, the plaintiff must furnish affidavits or other evidence
 10 necessary to satisfy his burden of establishing subject-matter jurisdiction.
 11 Id.

12 **B. Inadequate Medical Care Claim**

13 Defendant Auhl contends that as an officer of the United States
 14 Public Health Services ("PHS"), he is entitled to absolute immunity from
 15 suit for the performance of medical duties and related functions within the
 16 scope of his employment while stationed at the DHS/ICE-EI Centro
 17 Processing Center. The Public Health Service Act ("PHSA"), 42 U.S.C. §
 18 233, provides in relevant part:

19 The remedy against the United States provided by
 20 sections 1346(b) and 2672 of Title 28 [the Federal
 21 Tort Claims Act] . . . for damage for personal injury .
 22 . . . resulting from the performance of medical,
 23 surgical, dental, or related functions . . . by any
 24 commissioned officer or employee of the Public
 25 Health Service while acting within the scope of his
 26 office or employment, shall be exclusive of any
 27 other civil action or proceeding by reason of the
 28 same subject-matter against the officer or employee
 (or his estate) whose act or omission gave rise to
 the claim.

26 42 U.S.C. § 233(a). As held by the U.S. Supreme Court, "Section 233(a)
 27 grants absolute immunity to PHS officers and employees for actions arising
 28 out of the performance of medical or related functions within the scope of

1 their employment by barring all actions against them for such conduct.”
 2 Hui v. Castaneda, 559 U.S. 799, 806 (2010). Section 233(a) limits
 3 recovery for such conduct to suits against the United States under the
 4 Federal Tort Claims Act (“FTCA”). Id. “[P]roof of scope [of employment] is
 5 in most § 233(a) cases established by a declaration affirming that the
 6 defendant was a PHS official during the relevant time period.” Id. at 811.

7 In support of his claim of absolute immunity, Defendant Auhl has
 8 submitted a sworn declaration that he has been employed by the PHS as a
 9 commissioned Public Health Service Officer from August 2004 to the
 10 present. Auhl Decl. ¶ 3. Between September 2009 and November 2011,
 11 he worked as a nurse manager at the ICE Processing Center in El Centro.
 12 Id. ¶ 4. From November 2011 to October 2014, he worked as a Health
 13 Services Administrator at the facility. Id. These time periods encompass
 14 the entirety of the period at issue in Plaintiff’s Complaint. Auhl further
 15 attests that any involvement he may have had with the medical treatment
 16 provided to Plaintiff, or any other action he may have taken with respect to
 17 Plaintiff, was exclusively in his capacity as a PHS officer. Id. ¶ 5. From
 18 2009 to June 2014, Auhl held the rank of Lieutenant Commander in the
 19 PHS. Id. ¶ 6. On June 1, 2014, he was promoted to the rank of
 20 Commander. Id.

21 The majority of Plaintiff’s 116-page opposition has no bearing on the
 22 issue of Defendant Auhl’s immunity. See Opp’n, ECF No. 18. To the
 23 extent he does address the immunity issue, Plaintiff does not challenge
 24 that Auhl is a PHS officer, but rather contends that the immunity question
 25 cannot be determined without some factual development. Id. at 15.
 26 Specifically, citing Slavin v. Curry, 574 F.2d 1256 (5th Cir. 1978), he states
 27 that additional inquiry is required to determine whether the immunity
 28 extends to participation in a conspiracy. Id. at 15-16. In Slavin, the court

1 reasoned that additional inquiry, by way of a hearing, was necessary to
 2 determine the existence and extent of any immunity because liability could
 3 arise not only through an individual's actions, but also through participation
 4 in a conspiracy. Slavin, 574 F.2d at 1263. As an example, the court noted
 5 that private individuals cannot be held liable under 42 U.S.C. § 1983 for
 6 their conduct, but may nevertheless be held liable if they conspired with a
 7 person who acted under color of state law. Id. In contrast, however, the
 8 Supreme Court has found that the issue of immunity for PHS personnel
 9 begins and ends with the text of section 233(a). Hui, 559 U.S. at 805.
 10 Section 233(a) explicitly provides that the remedy against the United States
 11 provided by the FTCA "*shall be exclusive of any other civil action or*
 12 *proceeding by reason of the same subject-matter against the officer or*
 13 *employee (or his estate) whose act or omission gave rise to the claim.*" Id.
 14 at 805 (citing 42 U.S.C. § 233(a)) (emphasis in original). The text of
 15 section 233(a) plainly indicates that it forecloses a Bivens action against
 16 Defendant Auhl, as a PHS official, for the harm alleged in this case, and
 17 permits no other civil action against Auhl arising out of the performance of
 18 his medical and related functions other than a claim asserted against the
 19 United States under the FTCA.

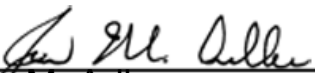
20 The Court concludes that it lacks subject-matter jurisdiction over
 21 Defendant Auhl because he entitled to absolute immunity under section
 22 233(a). The Court thus recommends that Auhl's Motion to Dismiss be
 23 **GRANTED** and that all claims against Auhl be **DISMISSED** with prejudice.

24 25 **IV. Conclusion and Recommendation**

26 For the foregoing reasons, this Court hereby recommends that
 27 Defendant Auhl's motion to dismiss be **GRANTED** and that the claims
 28 asserted against him by Plaintiff be **DISMISSED** with prejudice.

1 This Report and Recommendation is submitted to the Honorable
2 Cynthia A. Bashant, United States District Judge assigned to this case,
3 pursuant to the provisions of 28 U.S.C. § 636(b)(1). **IT IS ORDERED** that
4 not later than March 27, 2015, any party may file written objections with the
5 Court and serve a copy on all parties. The document should be captioned
6 "Objections to Report and Recommendation." **IT IS FURTHER ORDERED**
7 that any reply to the objections shall be served and filed not later than April
8 10, 2015. The parties are advised that failure to file objections within the
9 specified time may waive the right to raise those objections on appeal of
10 the Court's order. See Turner v. Duncan, 158 F.3d 449, 455 (9th Cir.
11 1998); Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

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13 DATED: March 5, 2015

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15 Jan M. Adler
16 U.S. Magistrate Judge
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